Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977 No. 77-1710

NATIONAL WILDLIFE ART EXCHANGE, INC., AND RALPH H. STEWART, *Petitioners*

v.

FRANKLIN MINT CORPORATION, *Respondent*

OBJECTION OF RESPONDENT TO MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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I. RELEVANT STATUTES

U.S. Sup. Ct. Rule 42, Briefs of an amicus curiae, provides:

> 1. A brief of an amicus curiae prior to consideration of the jurisdictional statement or of the petition for writ of certiorari, filed with the consent of the parties, or a motion for leave to file when consent is refused, may be filed only if submitted a reasonable time prior to the consideration of the jurisdictional statement or of the petition for writ of certiorari. Such motions are not favored. Distribution to the court under the applicable rules of the jurisdictional statement or of the petition for writ of certiorari, and its consideration thereof, will not be delayed pending the receipt of such brief or the filing of such motion.

2. A brief of an amicus curiae in cases before the court on the merits may be filed only after order of the court or when accompanied by written consent of all parties to the case and presented within the time allowed for the filing of the brief of the party supported.

3. When consent to the filing of a brief of an amicus curiae is refused by a party to the case, a motion for leave to file may timely be presented to the court. It shall concisely state the nature of the applicant's interest, set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case; and it shall in no event exceed five printed pages in length. A party served with such motion may seasonably file an objection concisely stating the reasons for withholding consent.

II. ARGUMENT—REASONS FOR DENYING THE MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

A. The Motion For Leave To File A Brief Amicus Curiae Should Be Denied For Failure To Comply With U.S. Supreme Court Rule 42-(3)

U.S. Sup. Ct. Rule 42-(3) states that a motion for leave to file a brief amicus curiae shall set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, and their relevancy to the disposition of the case.

Since, under U.S. Sup. Ct. Rule 42-(1) such motions are not favored, it is incumbent upon the moving party to clearly establish the need for a brief amicus curiae to be filed to bring new matter to the Court's attention.

The motion for leave to file brief amicus curiae filed on behalf of Ambassador Graphic Arts, Inc., Americana Graphics, Incorporated, Bama Fine Arts, Cottage Hill Wildlife Art, Foxfire Fine Arts, Masterpiece Reproduction Co., Realtech Art, Inc. and Stearns & Associates sets forth no facts or questions of law that cannot adequately be presented by the parties in any briefs on the merits which might be submitted. The motion does not set forth any reasons for believing that such facts or questions of law will not adequately be presented by the parties.

Review of the proposed brief amicus curiae submitted with the motion for leave to file the brief confirms that movant has, with respect to any relevant matters, done nothing more than raise questions of fact, including the question of credibility of testimony adduced at trial. These questions of fact have been repeatedly presented by the parties and properly answered by the United States District Court for the Eastern District of Pennsylvania and the United States Court of Appeals for the Third Circuit.

These questions of fact in the proposed brief are:

1. whether there is substantial similarity between the two works of art in issue;

2. whether a particular cluster of blossoms in one work of art resembles a butterfly in the other work of art; and

3. the artist's intent in creating the work alleged to infringe.

These questions of fact do not constitute such new matter as would be the proper subject of the brief of an amicus curiae.

B. The Motion For Leave To File A Brief Amicus Curiae Should Be Denied Because The Interest Of The Proposed Amici, As Disclosed In The Motion, Is No More Than A Remote Interest

The interest of the amici named in the motion is no more than a remote interest in the only issue actually involved in this litigation. This issue is whether a specific work of art entitled "The Cardinal" is a copy of and improperly appropriates the expression of a specific work of art entitled "Cardinals on Apple Blossom", notwithstanding the findings of fact of the two courts below (A 6, 10-13, 22, 31, 35).

The matters which the proposed amici seek to discuss in their brief, other than those questions of fact the parties have addressed and will undoubtedly address again if this Court requires, comprise, at most, issues collateral to the issue actually involved in the proceeding.

For the parties to be put in the position of having to respond to the proposed amici on such collateral issues would unnecessarily cause the briefs to be enlarged and would be likely to distract from the issue actually involved.

C. The Motion For Leave To File A Brief Amicus Curiae Should Be Denied As Untimely

U.S. Sup. Ct. Rule 42-(1) and -(3) state that a motion for leave to file a brief amicus curiae must be timely presented to the court.

The petition for a writ of certiorari of the party supported, petitioners National Wildlife Art Exchange, Inc. and Ralph H. Stewart, was due on May 15, 1978.

The motion for leave to file brief amicus curiae was not received by respondent until August 2, 1978. This motion manifestly has not been timely presented and therefore should not be granted.

III. CONCLUSION

For each and all of the foregoing reasons, the motion for leave to file a brief amicus curiae should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August 1978 three copies of the Objection Of Respondent To Motion For Leave To File Brief Amicus Curiae were served by first class mail on Arthur J. Levine, 1826 Jefferson Place, N.W., Washington, D.C. 20036, counsel for Ambassador Graphic Arts, Inc., Americana Graphics Incorporated, Bama Fine Arts, Cottage Hill Wildlife Art, Foxfire Fine Arts, Masterpiece Reproduction Co., Realtech Art, Inc. and Stearns & Associates; and three copies of the Objection Of Respondent To Motion For Leave To File Brief Amicus Curiae were served by first class mail on William C. McCoy, Jr., 625 National City Bank Building, Cleveland, Ohio 44114, counsel for petitioners.

I further certify that all parties required to be served have been served.

ARTHUR H. SEIDEL